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No. 350

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 360

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY AND FLOYD N. LEMMONS, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

Appellants seek review of the final judgment of a three-judge district court dismissing their suit to set aside the cancellation by the Interstate Commerce Commission of their proposed joint motor-rail rates on bituminous coal from Lynnville, Indiana, to Chicago, Illinois. The district court sustained the Commission's finding that the proposed joint rate was un-

just and unreasonable, and constituted a destructive competitive practice, under Section 216(e) of the Interstate Commerce Act, 49 U.S.C. 316(e), and the National Transportation Policy, 49 U.S.C. preceding Section 1.

Rail rates from the midwestern coal field to Chicago are on a group and differential basis prescribed in *Fine Coal From Midwestern Mines to Chicago*, 298 I.C.C. 37, and *Coal From Illinois, Indiana, and Kentucky to Illinois and Indiana*, 308 I.C.C. 673. The Princeton group, which includes Lynnville, is one of about fifteen groupings of origin points, each with common rates, and its rates are related in a fixed pattern to those of other origin groups. Appellants' proposed joint rate of $3.07 is equal to the all-rail rate from Lynnville and other points within the Princeton group (J.S. 13a). However, the proposed rate covers the performance of a seventeen-mile truck haul of the coal from the mines at Lynnville to appellant railroad's line at Haubstadt, Indiana (also within the Princeton group); the transfer there of the coal into rail hopper cars; and the line-haul transportation of the coal to Chicago (J.S. 13a–14a). The Commission found that, under the existing all-rail rates, the cost of any truck haul between the mine and the railhead is borne by the shipper (J.S. 16a). Similarly, under the all-rail rates the shipper is responsible for the transfer of the coal into the rail cars following the truck movement (Tr. 14, 27, 44). The all-rail rate was fixed on the basis of this division of responsibility and does not contemplate the performance of any trucking or transfer services (Tr. 14). Thus the proposed rate would relieve coal shippers of these truck-

ing and transfer burdens and shift them to appellant railroad at no increase in the rate (which presently covers only the line-haul by rail). Appellant railroad would provide these services through the device of a joint rate, although appellant motor carrier would actually perform them, receiving therefor a division of the joint rate (J.S. 13a–14a). Remaining for appellant railroad under the proposed rate would be its division ($2.39) for the line-haul from Haubstadt to Chicago, for which it normally receives the full all-rail Princeton-group rate of $3.07. As the Commission found, the proposed rate merely "would entail additional services at the same group rates" (J.S. 16a).

The Commission found further that, if it were to approve appellants' proposed rate, the anti-discrimination provisions of the Interstate Commerce Act, 49 U.S.C. 2, 3(1), would require the reduction of the all-rail rate from Haubstadt to the level of appellant railroad's division of the proposed joint rate; otherwise, there would be different rates for Lynnville and Haubstadt shippers for performance of the same line-haul service from Haubstadt (J.S. 16a). Preservation of a balanced rate structure would then require a similar reduction in the all-rail rate from Lynnville, leaving the rate pattern exactly as it now exists but at a lower level (*ibid.*). Moreover, the Commission found, a similar downward spiral would be caused by consequent reductions in the all-rail rate from Lynnville and by the consequent initiation of joint motor-rail rates by other railroads in the area, such as intervenor New York Central, which

provides all-rail service between Lynnville and Chicago (*ibid.*). The net effect, the Commission concluded, would be the dislocation of a complex and finely balanced just and reasonable group-differential rate structure and the dissipation of needed railroad revenues with neither an increase in total rail traffic nor any change in the allocation of traffic among the carriers.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The reasonableness of the existing rate structure and the destructiveness of the proposed change are matters peculiarly for the Commission. *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 593; *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83. Since, as the district court found, the Commission's findings were supported by substantial evidence, there appears to be no occasion for plenary consideration of the case by a second reviewing court.

1. Despite appellants' suggestion (J.S. 15), the Commission's estimate of the effect of the proposed rate upon the existing rate structure was not sheer speculation. The court below found (J.S. 8a) substantial evidence to support the Commission's prognosis that reductions in the all-rail rate from Lynnville would ensue (*e.g.*, Tr. 17–18) and that other carriers would be constrained to initiate similar joint rates (*e. g.*, Tr. 42, 65). Similarly the court found warrant in the record (*e.g.*, Tr. 12, 15–16, 65–66, 85) for the Commission's finding that approval of the proposed rate would reduce to an unreasonably low level

the rates for coal from the midwestern field to Chicago (J.S. 8a). No further review of the evidentiary basis for the Commission's order is required. *Radio Corp.* v. *United States,* 341 U.S. 412, 420; cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

2. The Commission cancelled appellants' proposed rate under the requirement of Section 216(c), 49 U.S.C. 316(c), that joint rates be reasonable, as well as in compliance with the prohibition in the National Transportation Policy, 49 U.S.C. preceding Section 1, against destructive competitive practices. Contrary to appellants' suggestion (J.S. 15), a finding of unreasonableness is not precluded by the compensatory nature of a rate. *New York* v. *United States,* 331 U.S. 284, 328. The relationship of the proposed rate to other rates and the avoidance of serious disparity are vital elements of the Commission's task. *Ibid.* Moreover, the National Transportation Policy is a specific command governing the administration of the entire Interstate Commerce Act, and prohibits the approval of any rate which constitutes a destructive competitive practice, whether or not reasonable from the standpoint of cost alone. *Eastern-Central Motor Carriers Ass'n* v. *United States,* 321 U.S. 194, 207; *Schaffer Transportation Co.* v. *United States, supra,* 355 U.S. at 87–88. Nor is the Commission required to stay its hand until the final stages of a wasteful and injurious rate war have precipitated rates to a disastrously low level (see *Jefferson Island Salt Mining Co.* v. *United States,* 6 F. 2d 315, 318 (N.D. Ohio); *New York* v. *United States, supra,* 331 U.S. at 345–346). Hence

the Commission properly cancelled the proposed rate. It was not required, in view of the permissive language of Section 216(g), to prescribe another rate in its stead. Section 216(g), 49 U.S.C. 316(g); *Contract Rates, Rugs and Carpeting from Amsterdam, New York*, 313 I.C.C. 247, 254, affirmed, *New York Central R. Co. v. United States*, 194 F. Supp. 947 (S.D.N.Y.), affirmed *per curiam*, 368 U.S. 349; *Facing or Flooring Tile—Malone Freight Lines, Inc.*, 68 M.C.C. 211, 214, affirmed, *Malone Freight Lines, Inc. v. United States*, 159 F. Supp. 952 (N.D. Ala.).

3. The orders of the Commission in no way impede the establishment and maintenance of joint motor-rail rates that are reasonable and nondestructive. The Commission has long advocated that railroads and motor carriers establish reasonable through routes and joint rates, *Coordination of Motor Transportation*, 182 I.C.C. 263, 387; *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, 747–48, and in its latest report to Congress the Commission recommended that Section 216(c) of the Act be amended to enable it to *require* railroads and certificated motor carriers to establish reasonable through routes and joint rates. *75th Annual Report of the Interstate Commerce Commission*, p. 186 (1961). Furthermore, the restrictions cited by appellants (J.S. 12) against the railroads' publication of proportional rates in connection with through routes with motor carriers, 49 C.F.R. § 141.31, were cancelled effective November 15, 1956 by Supplement 8, Tariff Circular No. 20, for the reason that "Joint rates of motor carriers with rail or water carriers be-

ing expressly authorized by statute, it is doubtful if proportional rates by Part I carriers conditioned upon a prior or subsequent movement by motor carrier can be generally prohibited" (Notice of Proposed Rule Making, 19 Fed. Reg. 3509, 3520).

4. Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3),[1] by its terms is inapplicable in a rate dispute which was essentially *intra*-modal, that is, between appellant railroad and the other railroads in the area. As the lower court found (J.S. 8a–9a):

> "The requirement of section 15a(3) of the Interstate Commerce Act that the Commission not hold up the rate of one mode of transportation to protect the traffic of another mode is inapplicable where, as herein, one railroad, albeit under a proposed joint rate with a motor carrier, is seeking to provide additional services than are provided by other railroads, though at the same rate. 49 U.S.C. § 15a(3); cf. New York, N.H. & H.R. Co. v. United States, 199 F. Supp. 635 (D. Conn. 1961); Missouri Pacific R. Co. v. United States,—— F. Supp. —— (E.D. Mo. 1962). The Commission was justified in considering the sub-

[1] Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3), provides:

"*In a proceeding involving competition between carriers of* different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

stance of the service proposed to be performed rather than the form of the rate alone; that is, the publication of the joint rate did not prevent the Commission from considering the intramodal competitive situation involved. See Motor-Rail-Motor Traffic in East and Midwest, 219 I.C.C. 245, 271 (1936).

Where, as here, the line-haul movement of the coal traffic will be accomplished by rail under both the existing all-rail rates and the joint motor-rail rates at issue, the joint motor-rail transportation may not properly be regarded as a separate and distinct mode of transportation. Moreover, the Commission plainly did not hold up the rates of one mode of transportation "to a particular level to protect the traffic of any other mode of transportation." Rather, it disapproved the rate proposal here to prevent the unnecessary dissipation of the revenues of all rail carriers through the disruption of the existing just and reasonable coal-rate structure.

CONCLUSION

The appeal presents no substantial issue warranting plenary consideration and the judgment of the court below should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
JOEL E. HOFFMAN,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission.

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